In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1188

JAIME J. MERINO, PETITIONER

v.

UNITED STATES MARSHAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In 1960, pursuant to the extradition treaty between the United States and Mexico, a complaint was filed for the extradition to Mexico of petitioner, formerly a district superintendent of Petroleos Mexicanos, commonly known as Pemex, an agency of the government of Mexico. The complaint, as amended, showed that petitioner had been duly charged in Mexico with the crimes of embezzlement of public funds, falsification of official acts and the uttering and use thereof for fraudulent purposes. After a hearing of approximately two weeks, the Commissioner, on June 12, 1961, entered an order finding that petitioner was extradictable.

734-491—64

On June 21, 1961, petitioner filed in the United States District Court for the Southern District of California a petition for a writ of habeas corpus in which he challenged the order of the commissioner. The writ was dismissed on April 3, 1963.[1] The order of the district court was affirmed by the court of appeals on December 14, 1963, with an opinion reported at 326 F. 2d 5. A petition for rehearing was denied on January 21, 1964. Petitioner obtained two extensions of time to file his petition for a writ of certiorari, and his petition was filed within the extended time on June 5, 1964.

The government submits that there is no occasion for further review of this case in which the just demands of a foreign government have already been long delayed.

1. At the extradition hearing, it was shown that Petroleos Mexicanos, or Pemex, is a decentralized public institution of Mexico which was created in 1938 for the management of expropriated petroleum companies and the exploitation of petroleum resources (Tr. 52–54). From 1942 through 1958 petitioner was the superintendent of the Poza Rica district of Pemex, a district which accounted for 81% of the total Mexican oil production (Tr. 306–307, 309, 443). In this capacity petitioner authorized and signed between 300 and 500 construction and improvement contracts a month (Tr. 107, 382–384, 490). Without petitioner's signature, the last to be subscribed, the

[1] Petitioner was ordered by the Commissioner to be held without bail. He was, however, admitted to bail in the habeas corpus proceedings.

contracts were valueless (Tr. 128, 488). Petitioner also signed about 500 vouchers a month authorizing payments under these contracts (Tr. 384–385, 534).

In 1957 and 1958 petitioner selected Carlos Osornio, an employee of Pemex whom he trusted, to receive indirectly the benefit of four contracts for the construction and painting of gas tanks (Tr. 92, 97–99, 108–109). Osornio could not be named as the contractor as he was a Pemex employee (Tr. 99). To avoid this difficulty petitioner ordered that the contracts be awarded for record purposes to Raul Govea and Alfonso Ortuno (Tr. 100, 108–109). Govea, a laborer who had no means of performing the work required by the contracts, agreed to "loan" his name and sign the contracts at the request of Osornio (Tr. 91–93). Ortuno also agreed to sign as a contractor. The work was actually performed by an independent contractor with the aid of materials and personnel of a Pemex department (Tr. 93–94, 98–99, 100, 102, 112), but payments were made to Govea and Ortuno, the contractors of record (Tr. 94, 95, 109–112). Govea and Ortuno turned the money over to Osornio, who paid for various contract materials not furnished by Pemex, and who then delivered the remainder of the money, about 8,000 to 10,000 pesos, to petitioner for "social business" (Tr. 96, 98–99, 102–103). Petitioner gave 1,000 or 2,000 pesos back to Osornio (Tr. 99–100).

Petitioner arranged to have funds for travel expenses of Pemex sports teams paid by false contracts for work already performed or kickbacks from a contractor (Tr. 113–115). Petitioner also made pay-

ments every week to Benito Berman, the head of an organization of unemployed union members (Tr. 116–117). A contract was drawn calling for payment of an equivalent sum in return for specified work (Tr. 116). The specified work was not intended to be done. It had already been done, or was subsequently done wholly or party by Pemex equipment and personnel (Tr. 116–118, 124–128).

Petitioner, testifying in his own behalf, admitted receipt of money from Osornio but claimed it was a contribution for a hospital (Tr. 425–426, 527-528). He also admitted that other contractors had made contributions to his hospital committee (Tr. 542–548). Petitioner also offered as a witness Roberto Taylor who testified that the general manager of Pemex had authorized the use of Pemex equipment by workers on contracts (Tr. 764–765). Petitioner offered the testimony of a Mr. Stern, the foreign law librarian of the Los Angeles County Law Library, to the effect that Pemex was not a public institution and petitioner was not a public employee (Tr. 590 ff.).

Petitioner asserts that the district court erred when, in reviewing the sufficiency of the evidence to show probable cause, it stated

> Upon an examination of the transcript this court is satisfied that there was evidence before the Commissioner upon which he could come to the conclusion that there was probable cause to believe that defendant should be held to answer the charges.

He argues that the district court should itself have made the finding of probable cause. But even in

habeas corpus, after an adjudication of guilt, it is not the function of the habeas corpus court to review the sufficiency of the evidence. *Sunal* v. *Large,* 332 U.S. 174. It is as true now, as it was at the time of the earlier decisions of this Court, that it is not the function of an extradition proceeding to decide guilt or innocence, but merely to determine whether there is sufficient probable cause to justify the United States in turning over the accused to the demanding country for a trial under its laws for the offense which is alleged to have been committed in that country. See *Fernandez* v. *Phillips,* 268 U.S. 311; *Charlton* v. *Kelly,* 229 U.S. 447; *Jimenez* v. *Aristeguieta,* 311 F. 2d 547 (C.A. 5), certiorari denied, 373 U.S. 914. The facts show that by any standard there was in this case ample evidence to sustain a finding of probable cause to subject petitioner to a trial.

2. Before, during and after the hearing, petitioner applied for an order of the Commissioner authorizing him to take depositions of certain witnesses in Mexico (see Pet. App. 20–29). The Commissioner denied the motion, apparently on the authority of the decision of this Court in *In re Luis Oteiza y Cortes,* 136 U.S. 330, 336–337, holding that there is no authority to accept evidence by deposition on behalf of the accused in an extradition proceeding. The court of appeals declined to review the matter on mandamus before a final order finding petitioner extraditable (289 F. 2d 636 and 324 F. 2d 687), but did consider the validity of this ruling in its opinion affirming the denial of the petition for a writ of habeas corpus. The court of appeals found it un-

necessary to consider whether testimony by deposition could be offered by an accused in an extradition hearing, for, as it correctly pointed out, in its opinion (Pet. App. 16), petitioner had shown "no authority resting in the Commissioner to compel the taking of depositions in Mexico or, if authorized, that such order would have any legal effect in Mexico."

The issue which petitioner seeks to raise, whether this Court should overrule the *Oteiza* holding that evidence by deposition cannot be received on behalf of the accused, is thus not presented by this case. The only issue which this record presents is whether the Commissioner should have ordered the taking of depositions. Petitioner has shown neither the necessity nor the authority for such an order. Petitioner did not need any order to take depositions under Rule 28 of the Rules of Civil Procedure, but he made no effort to take depositions under that rule. Petitioner did not ask any court for letters rogatory under 28 U.S.C. 1781. He did not even present any affidavits by the persons whose testimony he sought to take by deposition. Petitioner cannot challenge the holding of *Oteiza* that testimony other than that of live witnesses is inadmissible when he did not show any proper attempt to get the testimony in written form.[2] He cannot assert error in the failure of the Commissioner to act when he showed no statutory authority for the Commissioner to grant the order sought, while he himself failed to use the procedures that were available to him.

---

[2] Petitioner did produce at the hearing one of the witnesses whose deposition he sought, Roberto Taylor (Tr. 748, see Pet. App. 21).

Moreover, it is evident from the application (Pet. App. 20–29) that the evidence which petitioner sought to adduce was not the type of evidence which bore on probable cause, but was at most evidence which might relate to possible defenses which he might offer in a trial on the merits. That is not proper evidence in an extradition hearing. See *United States ex rel. Petrushansky v. Marasco*, 215 F. Supp. 953 (S.D.N.Y.), affirmed, 325 F. 2d 562, certiorari denied, 376 U.S. 952.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

JUNE 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1964